

Inter-Department Correspondence

City of Duluth, Minnesota

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To: Bryan F. Brown
City Attorney

From: Lisa D. Wilson
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Subject: Temporary employees

Questions have been raised recently about the hiring and scheduling of temporary employees. This memorandum will address the applicable law governing the use of temporary employees by the City.

Applicable law

The use of temporaries is governed by both state law (PELRA) and our civil service code. The Union is usually concerned about the PELRA aspects. Whether our use of temporaries complies with state law is determined by the BMS in a unit determination hearing. Our civil service definition of temporary employee does not govern application of state law. The state law does not require the City to divide up all work into full time permanent positions. What the law does require is that the City refrain from structuring its work force into part time or temporary positions for the purpose of eliminating or discouraging the bargaining unit. An important factor under the statute in unit determinations is the bargaining history of the parties. The contract provisions involved are the recognition clause and the lay off language. The bargaining history is examined by reviewing how the parties have done business in the past as it relates to certain positions. This means that if the parties have done business as a certain unit, that should continue absent a strong reason to the contrary. So the history of the City's use of temporaries is an important consideration when evaluating compliance with the law.

Definition of public employee

Only public employees are in the bargaining unit and eligible for pay and benefits set out in the contract. A temporary employee, by definition, is not a public employee. There are two types of temporary employees under the statute: part-time employees and seasonal employees.

A. Part-time employees Part-time employees are those whose hours do not exceed the lesser of 14 hours a week or 35% of the normal or usual work week for full-time employees in the bargaining unit. The predominant work week for the full-time employees in the bargaining unit is used as a baseline for determining the part-time threshold. Merely

going over the hourly threshold on an occasion will not make the part-time employee a public employee. The BMS applies the following six step test to determine whether a part-time employee exceeds the part-time threshold:

1. Determine the number of hours in the normal work week of the bargaining unit in which the employee would be included or excluded.
2. Calculate the part-time hourly exclusion, either more than 14 hours per week or 35% of the normal work week, whichever is less.
3. Identify the calendar year period.
4. Count the number of weeks during the calendar year period that the employee worked.
5. Determine the number of “weeks worked” during the calendar year period, in which the employee’s hours worked exceed the number determined in No. 2 above.
6. If a majority of the “weeks worked” during the calendar year period exceed the number determined in No. 2, the employee is considered a public employee and is included in the appropriate unit. If the employee’s “weeks worked” is less than a majority during the calendar year period, the employee is not a public employee and is excluded from the bargaining unit.

Stacking of part-time employees to avoid unionization, benefits or overtime is prohibited. We can’t take a full-time or permanent position and cut it up into several part-time positions in order to avoid the definition of public employee. Other reasons for part-time employees such as weekend fill to handle walk-ins or customer calls while the regular employees are off is OK.

B. Seasonal employees Employees whose position is basically seasonal and who work 67 days or less in a calendar year (100 days for students) are not public employees. Again, stacking is prohibited. We can’t take a position performed by one person and break it up into a series of 67 day temporary jobs for the purpose of avoiding paying union rates and benefits. We can’t take a group of substantially equivalent job duties that are consistently performed long term and divide them up among several 67 day employees. If an employer hires multiple employees for less than 67 days to fill the same position, the law presumes that the position is not temporary. Factors such as location of work performed, hours of work, and days of work are considered in determining whether it is the same position-i.e. a group of tasks performed by one person. If the City knew on the date that the employee was hired that the position would last longer than 67 days (100 days for students) then the employee is a public employee from day one. Those employees who are in a position thought to last less than 67 days, but which was extended for unforeseen circumstances, such as the project didn’t get done on time, are members of the bargaining unit when they work the 68th day. When judging the seasonal status of an

employee, the BMS looks at the substance of the employment relationship and applies the following 4 step procedure:

1. Identify the bargaining unit in which the employee is included.
2. Identify the calendar year period.
3. Calculate the number of days during the calendar year period during which the employee worked.
4. If the employee in question works 68 or more days during the calendar year period, the employee is a public employee and is included in the appropriate bargaining unit. If the employee works 67 or fewer days during the calendar year period, the employee is not considered a public employee and is excluded from the appropriate unit.

Conclusion

The use of temporary positions should be examined from the standpoint of the bargaining history between the parties, the operational reasons for the temporary positions and by way of application of the BMS standards. Temporary employees who do not meet the legal criteria are public employees and become members of the bargaining unit. This may pose a difficulty because an employee will hold a civil service position without going through the civil service system. If our use of temporaries does not meet the legal requirements, we should stop doing it. In that case, other options can be considered such as creation of a new generic classification that is so broad we can move employees around to where the work is as seasons change. Operationally, elimination of some programs and services may need to occur due to the increased cost. Additional discussions with the unions may also be helpful.